Supreme Court, U.S.
FILED
JAN 28 1993
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No. 92-725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SALVADOR GODINEZ, Warden,
Ely State Prison,
Petitioner,

v.

RICHARD ALLAN MORAN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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PETITION FOR CERTIORARI FILED OCTOBER 16, 1992
CERTIORARI GRANTED DECEMBER 14, 1992

QUESTIONS PRESENTED

I. Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a trial court to apply a heightened "reasoned choice" standard to determine the competency of a defendant to enter a plea of guilty or waive counsel, or whether the standard of competency to plead guilty and waive counsel is the same as the standard of competency to stand trial announced in Dusky v. United States, 362 U.S. 402 (1960).

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit [Ninth Circuit or circuit court] was filed on July 30, 1992. Appendix A to Petition for Writ of Certiorari [Petition]. Moran v. Godinez, 972 F.2d 263 (9th Cir. 1992). The federal

district court's unpublished decision which preceded the circuit court litigation as filed on March 11, 1991. Appendix B to Petition.

On direct appeal from the state court convictions, the Nevada Supreme Court entered its published Opinion on March 31, 1987. Appendix C to Petition. Moran v. State, 103 Nev. 138, 734 P.2d 712 (1987). The order of the Eighth Judicial District Court of the State of Nevada in and for the County of Clark [trial court or Clark County District Court], denying post-conviction relief, was filed on May 10, 1988. Appendix D to Petition. The Nevada Supreme Court's unpublished Order Dismissing Appeal of the post-conviction relief action was filed on March 15, 1989. Appendix E to Petition. This Court denied certiorari on October 2, 1989. Appendix F to Petition. Moran v. Whitley, ___ U.S. ___, 110 S.Ct. 207 (1989).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. U.S. Const. amend. VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

B. U.S. Const. amend. XIV, § 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C. Nev.Rev.Stat. § 178.400.

> Incompetent person cannot be tried, sentenced or punished for public offense.
>
> 1. A person may not be tried, adjudged to punishment or punished

for a public offense while he is incompetent.

2. For the purposes of this section "incompetent" means that the person is not of sufficient mentality to be able to understand the nature of the criminal charges against him, and because of that insufficiency, is not able to aid and assist his counsel in the defense interposed upon the trial or against the pronouncement of the judgment thereafter.

STATEMENT OF THE CASE

The Petitioner [State] has lawful custody of respondent Richard Allen Moran [MORAN] pursuant to two convictions for first degree murder and resultant sentences of death imposed in the Clark County District Court, along with two counts of robbery with the use of a deadly weapon and one count of first degree murder sustained in the same case, with resultant prison terms imposed thereon. MORAN is also in custody pursuant to a conviction for one count of first degree murder and the resultant term of life imprisonment without possibility of parole

imposed in another case in the Clark County District Court.

Initially, the first set of charges [the Red Pearl Saloon offenses] proceeded through the justice court system separately from the third murder offense [the Vandervoort murder]. MORAN rejected the advice of counsel and waived preliminary (probable cause) hearings in the justice court. District Court Clerk's Record [CR] 21, Exhibits 1 and 6. Separate criminal informations were filed and the cases were assigned to the same trial court. On September 19, 1984, and November 28, 1984, Jack Jurasky and William D. O'Gorman, both psychiatrists, filed their respective reports with the trial court stating that MORAN was competent to assist counsel and defend the charges against him. Joint Appendix [J.A.], pp.3-17. Nev. Rev. Stat. § 178.400.

On November 28, 1984, MORAN appeared before District Judge Myron Leavitt with a

different public defender assigned to each case. After a canvass, the court allowed MORAN to waive his right to the assistance of counsel. After a further canvass, the court (1) accepted MORAN's pleas of guilty to all charges in both cases; (2) scheduled imposition of court sentencing on the non-capital charges; (3) accepted MORAN's accession to a consolidated penalty hearing before a three judge panel on both capital counts; and (4) scheduled the penalty hearing on the capital charges. J.A., pp.18-68.

On December 17, 1984, MORAN appeared before Judge Leavitt in proper person. The judge told MORAN he was unwise not to have the assistance of counsel. Nevertheless, MORAN would not change his mind and the judge confirmed MORAN's previous statement he did not wish to have standby counsel to assist him. Judge Leavitt asked MORAN if he wanted to reconsider either of those

decisions and to have the assistance of an attorney. MORAN stated he did not. MORAN indicated he did not want to withdraw his plea in either case. MORAN also stated he chose not to have any witnesses present on his behalf at the penalty hearing. He did not want anyone to investigate for the existence of mitigating circumstances. CR 21, Exhibit 8.

On January 21, 1985, MORAN appeared without counsel for sentencing on the non-capital counts. The court ordered imposition of consecutive fifteen (15) year terms for the robbery counts and weapons' use enhancements, as well as the arson count. CR 21, Exhibit 5.

That same day, pursuant to Nev. Rev. Stat. § 175.552, a three judge panel convened to consider evidence pertaining to the penalty to be imposed on the three murder counts. CR 21, Exhibit 9. In the Red Pearl Saloon murders, the panel found the exis-

tence of two aggravating circumstances beyond a reasonable doubt. It also found the existence of two mitigating circumstances. The panel found beyond a reasonable doubt that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, and set the penalty at death on both counts. Nev. Rev. Stat. §§ 200.030(4), 200.033 and 200.035. CR 21, Exhibit 5.

In the Vandervoort murder, the panel found the existence of two aggravating circumstances beyond a reasonable doubt. It also found the existence of one mitigating circumstance. The panel found that beyond a reasonable doubt, the mitigating circumstance was insufficient to outweigh the aggravating circumstances. It set the penalty at death. CR 21, Exhibit 8.

The cases proceeded on automatic direct appeal to the Nevada Supreme Court. On March 31, 1987, the court issued its Opinion

affirming all convictions and sentences in the Red Pearl Saloon case. It modified the sentence for the Vandervoort murder from death to life without the possibility of parole. Appendix C to Petition.

On July 30, 1987, pursuant to Nev. Rev. Stat. § 177.315, et seq., MORAN filed a petition for post-conviction relief in the trial court. After an evidentiary hearing, the court entered its Order Denying Post-Conviction Petition on May 10, 1988. Appendix D to Petition. MORAN appealed the denial of collateral relief to the Nevada Supreme Court. On March 15, 1989, the Nevada Supreme Court entered its Order Dismissing Appeal, affirming each of the convictions and sentences. Appendix E to Petition. MORAN sought certiorari from this Court. CR 21, Exhibit 29. This Court denied certiorari. Appendix F to Petition for Writ of Certiorari.

MORAN then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. CR 1, CR 24. That petition was denied by the United States District Court for the District of Nevada, in its Memorandum Decision and Order entered March 11, 1991. Appendix B to Petition. CR 48. MORAN appealed to the Ninth Circuit. On July 30, 1992, the Ninth Circuit entered its Opinion reversing the district court judgment denying habeas relief and remanding with instructions. In its Opinion, the court held that the correct legal standard to waive counsel and to enter a guilty plea requires a higher level of mental competency than that required to stand trial. Appendix A to Petition. The State then filed a petition for writ of certiorari with this Court. On December 14, 1992, this Court entered its order granting the petition for writ of certiorari. ___ U.S. ___, ___ S.Ct. ___, J.A., pp.1-2.

STATEMENT OF THE FACTS

1. Operative Facts of the Offenses

On September 4, 1984, when MORAN appeared in the Las Vegas Justice Court on the Vandervoort murder and voiced his intent to waive preliminary hearing despite his attorney's advice not to do so, Justice of the Peace Daniel Ahlstrom directed the prosecutor to review each count and to state what the prosecutor was prepared to prove regarding the murder of Linda Vandervoort. Las Vegas Metropolitan Police Department (LVMPD) Officer O'Such was prepared to testify that he and another police officer arrived at Vandervoort's apartment at approximately 4:45 p.m. and after observing what he believed to be a bullet hole in the adjoining apartment, they entered the apartment of Vandervoort to find her crumpled body full of bullet holes. Dr. Clark, a forensic pathologist, was prepared to testify that the victim died of numerous

gunshot wounds inflicted by a large caliber gun. Officer B.W. Jackson, a corrections officer with the LVMPD, was prepared to testify that when MORAN awakened after surgery for gunshot wounds sustained in a suicide attempt, MORAN asked Jackson if he was a policeman and if MORAN's wife was dead. Jackson was also prepared to testify that MORAN had volunteered information to the effect that he had killed three people within the last couple of weeks and later clarified that MORAN stated that the victims were his wife and two people in the Red Pearl bar.

MORAN stated to Judge Ahlstrom that he understood what the prosecutor had said and he admitted committing the offense. MORAN was advised the State was seeking the death penalty in the Red Pearl case as well as the case involving the killing of Vandervoort. The preliminary examination was waived and MORAN was held to answer the charges.

On September 5, 1984, MORAN again appeared before Judge Ahlstrom on the Red Pearl charges and waived his right to a preliminary hearing. This was against the advice of his attorney, a different public defender than in the Vandervoort case. CR 21, Exhibit 1. The court asked the prosecutor to review each count and state what the prosecutor was prepared to prove. Ralph Warne was prepared to testify that he owned the Red Pearl Saloon in Las Vegas, Nevada. He had left the lounge at 10:00 p.m., August 1, 1984. Sandra Devere was the bartender he left in charge. When Warne returned to the lounge at about 5:30 a.m., on August 2, 1984, he found the dead bodies of Devere and a customer, Russell Rhoads. Over $900 was missing, along with the cash register. CR 21, Exhibit 1, p. 3.

Captain Mike Patterson, of the Clark County Fire Department, investigated the fires that had been set at the Red Pearl the

morning of August 2, 1984. He was prepared to testify as an expert that the fires had been set in several different locations in the lounge. Id., p. 4. Dr. Sheldon Greene, a forensic pathologist, performed the autopsies on Rhoads and Devere. He was prepared to testify that each had died from multiple gunshot wounds inflicted by a large caliber weapon. Id., 4. LVMPD Officer B. W. Jackson was prepared to testify that MORAN admitted in a statement to police he had killed his ex-wife and two people at the Red Pearl. Id., p.4. Detective Joseph McGuckin later videotaped an interview after advising MORAN of his rights. MORAN admitted he had killed Rhoads and Devere with a .45 automatic pistol. Id., p. 5.

MORAN told Judge Ahlstrom that he understood what had been said. MORAN admitted he had committed all the offenses. MORAN was advised the state was seeking the death penalty in the Red Pearl case as well as the

Vandervoort case. MORAN admitted to the conduct contained in each of the counts. The preliminary examination was waived and MORAN was held to answer to the charges. Id., pp. 6-10.

On November 28, 1984, MORAN appeared before Judge Leavitt for arraignment. The judge performed an extensive canvass regarding MORAN's desire to waive counsel and to enter guilty pleas on all charges. He allowed MORAN to waive and plead guilty. J.A., pp.18-68.

On January 21, 1985, the penalty hearing was held. CR 21, Exhibit 9. Captain Patterson testified about the fires that had been set at the Red Pearl the morning of the killings. Photo exhibits were introduced showing the scene of the fires and killings. Id., pp. 6-16. Detective McGuckin, who investigated the killings at the Red Pearl described the scene as he saw it the early morning hours of August 2, 1984. Id., pp.

17-29. Numerous photos were entered into evidence. MORAN did not want to see them and did not object to their admission. Id., p. 30. Detective McGuckin interviewed a witness who saw a vehicle similar to MORAN's leave the scene of the crime. Detective McGuckin testified regarding details of his pre-interview interaction, including a Miranda canvass, with MORAN. Id., pp. 42-46, 51. Judge Leavitt found that the statement made by MORAN was voluntary. Id., p. 52. MORAN had admitted to the killings, the arson and the robberies. Id., p. 53. MORAN gave his consent to the police to search his residence and his vehicle. Id., pp. 56-57. MORAN had written confessions that were discovered at his apartment. Id., pp. 58-59; CR 21, Exhibit 2. MORAN wanted the death penalty. CR 21, Exhibit 9, pp. 60-61. MORAN was very cooperative. Id., p. 127. The videotape of the interview amply illustrated MORAN's awareness and understanding of the

proceedings. Penalty Hearing, CR 21, Exhibit 42.

Tammy Cortez, originally a co-defendant of MORAN's in the Red Pearl case, testified she was with MORAN when he went into the bar. Id., pp. 74-76. She described what happened inside the lounge. She saw MORAN shoot Devere and then reach behind Cortez, shooting Rhoads where he sat next to Cortez on a stool. Id., pp. 77-83. Later, Cortez saw him leave the bar, reenter it, and exit carrying a cash register. MORAN told her not to tell the police. Id., pp. 85-87.

Detective Dillard testified about his investigation nine days later of the killing of Linda Vandervoort. MORAN had initially told the police that intruders had shot him and Vandervoort. Dillard described photo exhibits showing the scene where Vandervoort was shot. MORAN shot his ex-wife with the gun that he had used to kill Rhoads and Devere. Id., pp. 168-207. Detective Dillard

was specifically asked about MORAN's condition at the hospital in light of MORAN's apparent pain and his being medicated. Dillard said MORAN was cooperative and not reluctant to talk. MORAN was cogent and spoke without being threatened, promised anything or induced to talk. MORAN was able to understand and was aware of the purpose of the videotaped interview. Id., pp. 121-128. Judge Leavitt found the taped interview to be knowingly, freely and voluntarily given. It was played for the sentencing panel. (The tape was provided to the Ninth Circuit for its review below).

After presentation of the state's evidence, the court advised MORAN of his right to present evidence of mitigating circumstances and to make an unsworn statement. MORAN declined to offer any evidence in mitigation. Id., pp.139-143. The only statement MORAN made was that he had been under the influence of a lot of drugs. Id,. p.141.

2. Facts Regarding the Post-Conviction Relief Hearing

Judge Leavitt conducted a post-conviction relief hearing (CR 9, Petition, Tab B), at which Dr. O'Gorman testified. J.A., pp.69-89. Judge Leavitt found MORAN did not meet his burden of proof in attempting to show his guilty pleas were involuntarily entered, because MORAN presented no evidence as to the effect on him of any drugs he may have ingested prior to the entry of his plea. Judge Leavitt concluded that the evidence presented by MORAN, to the effect that he was depressed and desired the death penalty, was insufficient to make his plea involuntary. Appendix D to Petition for Writ of Certiorari, at D-9.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Ninth Circuit Court of Appeals upon a petition for writ of certiorari arises under 28 U.S.C. § 1254(a).

SUMMARY OF THE ARGUMENT

In Dusky v. United States, 362 U.S. 402 (1960), this Court enunciated the standard of mental competence for a defendant to stand trial: [T]he "test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as a factual understanding of the proceedings against him." The State urges this Court to apply the Dusky "understand and assist" mental competency standard to those instances where a defendant chooses to waive his right to counsel or to enter a guilty plea.

Even though MORAN had been found competent under Nevada law to stand trial, the Ninth Circuit incorrectly concluded that the federal constitution requires a higher "reasoned choice" standard to assess a defendant's competency to waive his right

to counsel and to enter a plea of guilty. The reasons stated by the Ninth Circuit in applying a heightened standard of mental competency to plead guilty have been considered and rejected by nearly every other federal circuit. The Ninth Circuit's requirement that a heightened standard of mental competency be applied when an individual enters a plea of guilty or waives his right to counsel conflicts with better reasoned decisions of most other federal circuit courts of appeal and state appellate courts of last resort, which have relied on this Court's decision in Dusky. The Ninth Circuit's test unduly complicates the process that both state and federal trial judges must undertake when assessing the mental ability of a defendant. The Ninth Circuit's dual standard creates a dichotomy where defendants, although deemed competent to stand trial, could be denied the opportunity to engage in plea bargaining because

they do not have the requisite higher degree of competency to enter a plea.

Once the Ninth Circuit adopted a heightened standard in this case, a course never urged by MORAN[1], it improperly decided factual issues in a plenary fashion and concluded that MORAN was incompetent without remanding the case either to the district court or the state trial court for further evidentiary proceedings. The circuit court

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[1] It is the State's position that the holding below announced a new rule of federal constitutional law. In general, a case announces a "new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. Penry v. Lynaugh, 492 U.S. 302 (1989). New rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions." Id. at 329. A decision announces a new rule "'if the result was not dictated by the precedent existing at the time the defendant's conviction became final.'" Id. at 314, quoting Teague v. Lane, 489 U.S. at 288, 301 (1989). Should this court disagree with the State and require application of the heightened standard adopted by the Ninth Circuit, this Court could and should nevertheless vacate the decision below on the basis of the nonapplicability of the new rule in this collateral proceeding.

impermissibly disregarded the state court findings regarding the factual issues surrounding waiver of counsel and pleas of guilty. Thus, the Ninth Circuit violated this Court's well established requirement of deference to state court findings regarding competency. Maggio v. Fulford, 462 U.S. 111, 113-121 (1983). The state trial court not only conducted an extensive canvass of MORAN, but also conducted a hearing on the issue of MORAN's mental competence to enter his plea of guilty and to waive counsel. The state trial court had an opportunity to observe the demeanor of MORAN and to weigh the evidence before it. There was no question in the judge's mind that MORAN was mentally competent to enter his pleas of guilty and to waive counsel.

Later, with the assistance of counsel, MORAN failed to convince the judge that certain prescription medications he was using at the time he waived counsel and

entered his pleas impacted his ability to participate in the process. The Ninth Circuit inexplicably has chosen to disregard those findings and instead has concluded that the state court did not apply the right legal standard, that is, a heightened "reasoned choice" standard. The Ninth Circuit has engaged in impermissible fact-finding and has substituted its judgment about the facts for that of the state trial court and the Nevada Supreme Court, respectively, based solely on its reading of the cold, naked transcript of the state court hearings. It has expanded its role beyond the bounds limiting federal courts of appeal. Amadeo v. Zant, 486 U.S. 214, 228 (1988). In so doing, it has breached the precedent of this Court, Wainwright v. Goode, 464 U.S. 78, 85 (1983); as well as its own. Neuschafer v. McKay, 807 F.2d 839 (9th Cir. 1987).

ARGUMENT

A. THE STANDARD FOR MENTAL COMPETENCY OF AN ACCUSED TO VOLUNTARILY PLEAD GUILTY OR TO WAIVE HIS RIGHT TO COUNSEL SHOULD BE THE SAME AS THAT TO STAND TRIAL.

The criminal conviction of an incompetent defendant is a denial of the due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Pate v. Robinson, 383 U.S. 375 (1966). A person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. Drope v. Missouri, 420 U.S. 162 (1975). However, none of the Court's precedents, including a critically ambiguous holding in Westbrook v. Arizona, 384 U.S. 150 (1966), which involved a waiver of counsel circumstance, have transmuted the federal common law or long established state and federal statutory codifications into a

due process mandate whereby the states must apply a heightened standard of competence in situations where a defendant desires to waive counsel or enter a guilty plea.

In Dusky, this Court was concerned only with the accused's competency to stand trial. This Court announced a general standard for mental competency without identifying it as a constitutionally compelled minimum.[2] Language extracted from Dusky has consistently been used by most circuit

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[2] There is no specific codified federal standard governing waiver of counsel or entry of guilty pleas. 18 U.S.C. § 4241 codifies the Dusky standard generally. It states in pertinent part that "at any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." (Emphasis added).

courts to evaluate mental competence to enter a guilty plea. Just last Term, in Medina v. California, ___ U.S. ___, ___, 112 S.Ct. 2572, 2579 (1992), this Court cited Dusky and Drope, for the proposition that

> If a defendant is incompetent, due process considerations require suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him . . . The entry of a plea of not guilty by reason of insanity, by contrast, presupposes that the defendant is competent to stand trial and to enter a plea." (Emphasis added).

This Court has never precisely decided the issue of whether the standard for mental competency of an accused to plead guilty is the same as that to stand trial. Several circuits (First, Third, Fourth, Fifth, Sixth, Seventh and Eleventh) have expressly disavowed use of a heightened standard. With the exception of the Ninth Circuit[3] and the D.C. Circuit, virtually all of the

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[3] Seiling v. Eyman, 489 F.2d 211 (9th Cir. 1973).

remaining circuits (Second, Eighth, and Tenth) have interpreted the Dusky standard to apply to pleas of guilty without differentiating a high standard in the context of a waiver of counsel.

Likewise, the apparent consensus among state intermediate and appellate courts of last resort which have addressed the issue has been to apply Dusky to the context of a guilty plea situation. Several have expressly rejected a dual standard.[4]

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[4] See, e.g., People v. Heral, 323 N.E.2d 138, 140 (Ill.App.3d 1975) (expressly rejecting heightened standard for guilty pleas); Littlefield v. Commonwealth, 554 S.W.2d 872, 873 (Ky.App.), cert. denied, 434 U.S. 987 (1977) (expressly rejecting Seiling); Commonwealth v. Hubbard, 355 N.E.2d 469, 476 (Mass. 1976) (applying Dusky to trial and plea situations alike); People v. Belanger, 252 N.W.2d 472, 477 (Mich.App. 1977) (expressly rejecting Seiling and indicating Dusky standard as sufficient protection for any defendant either to stand trial or to submit a guilty plea); State v. Marteney, 313 N.W.2d 449, 453 (Neb. 1981) (essentially adopting a "understand and assist" test without reference to Dusky); State v. Lucas, 794 P.2d 1201, 1204 (N.M. Ct.App. 1990) (expressly rejecting Seiling); State v. Lambert, 225 S.E.2d 340 (S.C. 1976) (continued...)

While at least one commentator has urged the adoption of a heightened standard of competency in cases where defendants choose to proceed to trial as well as in cases of waiver of counsel and guilty plea situations, that approach apparently has garnered little support from the courts which face the practical problem of having to administer a system of criminal justice on a daily basis.[5]

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[4](...continued)
(noting that test for competency to plead is no more stringent than test for competency to stand trial). Contra, State v. Sims, 575 P.2d 1236, 1241 (Ariz. 1978) (expressly adopting Seiling and effectively overruling State v. Contreras, 542 P.2d 17, 18-19 (Ariz. 1975) (expressly noting disagreement with reasoning and interpretation of Dusky and Westbrook by Seiling court)); Starks v. State, 486 N.E.2d 491, 492 (Ind. 1985). See generally 38 A.L.R. Fed. 238 § 5.

[5] Note, Competence to Plead Guilty: A New Standard, 1974 Duke L.J. 149 (1974).

1. SIX CIRCUIT COURTS WHICH HAVE ADOPTED THE DUSKY STANDARD HAVE EXPRESSLY REJECTED THE USE OF A HEIGHTENED STANDARD IN A PLEA CONTEXT.

In Allard v. Helgemoe, 572 F.2d 1 (1st Cir.), cert. denied 439 U.S. 858 (1978), the court dealt with the precise issue before this Court. Without expressly rejecting Seiling, the circuit court held the standard of competence to plead is the same as the standard of competence to stand trial, Allard, at 4, citing Dusky, as the source of a unitary standard. In Allard, a New Hampshire prisoner argued there was a category of defendants who do not have the mental capacity to plead guilty but who may be competent to stand trial under Dusky, and he was in that category. The Allard court noted this view was generally unsupported in the case law. In addition, the court felt that Allard's assertion raised disturbing policy issues as well.

Allard contended his "middle" category of competence would not create administrative problems for the criminal justice system or unfairness for other defendants. He suggested that normal plea bargaining should take place, followed by a competency hearing to determine the defendant's ability to stand trial or to plead guilty. If the defendant were found competent to stand trial but not to plead guilty, he would have to be tried. If the defendant were then found guilty, the prosecutor would be bound to the terms of the original plea agreement.

The Allard court rejected these contentions as unworkable. The court opined that if the prosecutor must plea bargain in the dark without knowledge of defendant's possible incapacity to understand the charges against him, the plea bargaining system would become even more unwieldy than at present. Id. As astutely noted by the court, while there are currently psychologi-

cal experts who claim to be able to determine an individual's competency to stand trial under the general standard of Dusky, the court knew of no similar experts capable of determining whether or not a specific individual fully understands all of the elements of a particular offense. Under Allard's plan, most defendants would have every incentive to be found incompetent to plead. They would then have the best of all possible worlds -- a chance to convince the jury of their innocence, and a prosecutor bound to the lenient sentence offered in plea bargaining if they are found guilty. The court said it would be hard to imagine a defendant so incompetent that he would not want to at least try to take advantage of this possibility.

On the other hand, if the prosecutor has some knowledge of the defendant's infirm mental state or his intention to have his competency to plead determined at a hearing,

there is no reason for him to plea bargain until the hearing is completed. A defendant found incompetent to plead would then be tried without the benefit of plea bargaining. If found guilty, a defendant would simply have his sentence determined in the discretion of the trial judge within the law, a less reliable guarantee of leniency than a plea bargain could provide.

Allard also argued that an understanding of the elements of the offense with which one is charged is essential in practical terms to make any kind of informed evaluation as to the probability of success at trial. He argued that such an understanding is a prerequisite for a constitutional guilty plea, unless there is factual evidence on the record that can serve as a substitute. The Allard court rejected the assertion, holding the Dusky standard governs mental competence to stand trial and to plead guilty. The court stated:

> [T]he competency cases deal with the subjective ability of the defendant to participate in the process. . . The voluntary waiver analysis of Henderson [v. Morgan, 426 U.S. 639 (1976)] does not contradict the case law and policy arguments which maintain that the Dusky standard should apply to questions of a defendant's mental competence to stand trial and his competence to plead guilty.
>
> . . .
>
> [T]here must always be some compromise between a system's fairness and its ability to function; the courts must attempt to maximize the fairness in the system as a whole, although in a particular case that may result in less than maximum fairness for a particular individual. Because in many cases it could create a hardship to deprive a defendant of the opportunity to accept his counsel's recommendation and plead guilty, and because a standard of incapacity to plead guilty different from the standard of incompetence to stand trial could not be created without incurring that result, we hold that the incapacity to understand part of the elements of the offense with which one is charged does not, without more, make a guilty plea involuntary in constitutional terms.

Id. Accord, Figueroa-Vasquez v. United States, 718 F.2d 511, 513 (1st Cir. 1983).

In the earliest case rejecting a heightened standard, United States v. Harlan, 480

F.2d 515, 517 (6th Cir.) cert. denied, 414 U.S. 1006 (1973), the court denied a federal prisoner's claim that the test for competency to plead guilty should be more stringent than the test for competency to stand trial.

In Malinauskas v. United States, 505 F.2d 649 (5th Cir. 1974), Malinauskas argued that a different medical-legal standard should apply to the voluntariness of a guilty plea, and a defendant's competence to stand trial is not determinative of the issue. Id. at p.652. The Fifth Circuit rejected the argument, finding that decisions in prior cases could serve as predicates for this contention. The court concluded the test of mental competency at the time of trial or the entry of a plea in a criminal case is the same. Id. at 654. Accord, Bouchillon v. Collins, 907 F.2d 589 (5th Cir. 1990) (test of incompetency, whether it be to enter a guilty plea or to go to trial, is whether

a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." Id. at 592, citing Dusky).

In United States ex rel. McGough v. Hewitt, 528 F.2d 339 (3rd Cir. 1975), the court rejected a Pennsylvania state prisoner's claim of incompetence to enter a guilty plea and expressly rejected the Ninth Circuit's heightened standard analysis in Seiling. The court's reasoning follows:

> The [Seiling] court interpreted [Westbrook] as implying that a higher standard of capacity was required to enter a plea of guilty than to stand trial. We have difficulty with that premise.
>
> The Dusky standard for competence to stand trial requires that the accused have a rational and factual understanding of the proceeding. That level of competence would seem to apply to entering a plea as well as to standing trial. The trial court has the duty of determining the voluntariness of the plea and the defendant's understanding of its consequences. Interrogation by the

> judge is designed to provide an on-the-record demonstration that the obligation has been met. We do not think that a mental standard, different than that for trial competence is required for a guilty plea.

McGough, n.2 at 342.

In United States ex rel. Heral v. Franzen, 667 F.2d 633 (7th Cir. 1981), the Seventh Circuit agreed with the other circuits expressly rejecting the Seiling standard for the same practical and equity reasons that the Allard court rejected a dual standard.

In Shaw v. Martin, 733 F.2d 304 (4th Cir.), cert. denied 469 U.S. 873, reh'g denied, 469 U.S. 1073 (1984) and again in Roach v. Martin, 757 F.2d 1463 (4th Cir.), cert. denied, 474 U.S. 1039, reh'g denied, 474 U.S. 1014 (1985), the Fourth Circuit held that to show incompetence to plead guilty, a defendant must demonstrate that "his mental faculties were so impaired . . . when he pleaded that he was incapable of full understanding and appreciation of the

charges against him, of comprehending his constitutional rights and of realizing the consequences of his plea." Roach at p.1480. The court stated that this standard of competence to plead guilty "paralleled" the standard established in Dusky, Id.

2. FOUR CIRCUIT COURTS WHICH HAVE ADOPTED THE DUSKY STANDARD IN A PLEA CONTEXT DID NOT ADDRESS THE HEIGHTENED STANDARD ISSUE.

In United States v. Valentino, 283 F.2d 634, 635 (2nd Cir. 1960), even though the court did not cite the recently announced Dusky standard, the court relied on the pre-Dusky statutory formulation for competency found at 18 U.S.C. § 4244 and held that a prisoner who had pled guilty but who was later found to be "insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense" could seek relief.

The Eighth Circuit first applied the Dusky standard in Butler v. United States,

384 F.2d 522 (8th Cir.), cert. denied, 391 U.S. 952 (1968) and more recently in Stanley v. Lockhart, 941 F.2d 707 (8th Cir. 1991). Although neither case dealt with the precise issue of the appropriate standard of mental competency to be applied when a defendant enters a plea of guilty, the defendants in both cases entered guilty pleas and the circuit court unhesitatingly applied the Dusky standard.

The Tenth Circuit expressly has adopted the Dusky standard for mental competency at the time of trial or the entering of plea in a criminal case. Wolf v. United States, 430 F.2d 443 (10th Cir. 1970). The court stated:

> the test of mental competency at the time of trial or the entering of a plea in a criminal case is that the accused have sufficient 'present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.'"

Although the standard to be applied did not appear to be at issue, nevertheless the Tenth Circuit affirmed the Dusky standard of mental competency in a plea context.

Most recently, in U.S. v. Simmons, 961 F.2d 183, 187 (11th Cir. 1992), the Eleventh Circuit announced the governing standard of mental competency in a plea context:

> A defendant competent to stand trial is one who has 'sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding -- and [one who] has a rational as well as factual understanding of the proceedings against him [or her].' (Citations omitted). This standard of mental competency is the same as that required for entering a guilty plea. (Citations omitted).

3. ONLY TWO CIRCUITS HAVE ADOPTED A HEIGHTENED STANDARD IN A PLEA CONTEXT.

The only circuits that have applied a contrary and higher standard in a plea context are the United States Court of Appeals for the District of Columbia and the Ninth Circuit. See United States v.

Masthers, 539 F.2d 721 (D.C. Cir. 1976); Moran at 267-268; and Seiling at 214-215. The Ninth Circuit concluded in Moran that the correct legal standard for determining competency to waive constitutional rights requires a higher level of mental functioning -- the capacity for a "reasoned choice" -- than that required to stand trial. However, as noted above, the majority of circuits and many state courts which have considered the issue have rejected this reasoning and concluded the test should be the same. For the reasons stated in Allard, Franzen and other cases discussed earlier, this Court should do likewise. As long as a trial court determines that a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and has a rational as well as factual understanding of the proceedings

against him, the right to due process has been protected.

4. THE HOLDING OF THIS COURT IN WESTBROOK V. ARIZONA DID NOT ESTABLISH A HIGHER STANDARD OF COMPETENCY IN ORDER FOR A DEFENDANT TO WAIVE COUNSEL.

In Westbrook, the Arizona courts conducted a hearing on the defendant's competence to stand trial, but there had been no hearing or inquiry as to his competence to waive his constitutional right to the assistance of counsel and to conduct his own defense. This Court held:

> The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused -- whose life or liberty is at stake -- is without counsel. This protecting duty imposes a serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. Johnson v. Zerbst, 304 U.S. 458 (citation omitted).

Westbrook, at 150.

In order to represent himself, an accused must knowingly and intelligently forego the traditional benefits associated with right

to counsel. He should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. Faretta v. California, 422 U.S. 806, 835 (1975). If the record clearly shows that the petitioner has expressly declined an offer of counsel by the trial judge, a state prisoner in federal collateral proceedings must show by a preponderance of the evidence that his acquiescence was not sufficiently understanding and intelligent to amount to an effective waiver. Moore v. Michigan, 355 U.S. 155, 160-161 (1957); Carnley v. Cochran, 369 U.S. 506, 516 (1962).

This Court's decision in Westbrook has been problematic for both state and federal courts. The Westbrook holding has been described as "cryptic," People v. Matheson, 245 N.W.2d 551, 554 (Mich.App. 1976). The degree of uncertainty the Westbrook holding

has engendered is aptly demonstrated by the Sixth Circuit's characterization of the standard as being "vaguely higher than the competency [standard] to stand trial." United States v. McDowell, 814 F.2d 245 (6th Cir.), cert. denied, 484 U.S. 478, reh'g denied, 484 U.S. 764 (1988). See also, United States v. Clark, 943 F.2d 775, 786 (7th Cir. 1991); Blackmon v. Armontrout, 875 F.2d 164, 166 (8th Cir.), cert. denied 493 U.S. 939 (1989).

Given its lack of definition, Westbrook has been read narrowly, that is, not to require a separate hearing or application of a higher standard, but merely an "additional effort" when dealing with defendants who are of subnormal intelligence. Carvalho v. Olim, 519 P.2d 892, 897, n.2 (Haw. 1974). Given the specific holding in Dusky, at most Westbrook reasonably can be read to say only that a finding on competence does not necessarily foreclose the issue of competence to

waive counsel. United States ex rel. Koningsberg v. Vincent, 388 F.Supp. 221, 225 (S.D.N.Y.), aff'd 526 F.2d 131 (2d. Cir.), cert. denied, 426 U.S. 937 (1976); State v. Drobel, 815 P.2d 724 (Utah.App. 1991).

Westbrook did not define expressly or inferentially a higher standard of competency in a constitutional, due process sense. Coronado v. Lefevre, 748 F.Supp. 131 (S.D.N.Y. 1990). Indeed, on facts similar to those in this case, where a defendant waived representation by counsel and then pleaded guilty, one court has gone so far as to hold that Westbrook was inapposite. Splitt v. United States, 364 F.2d 594, 598 (6th Cir.), cert. denied 385 U.S. 1019 (1967). Westbrook requires no more than a finding of competence to stand trial under the "understand and assist" standard, coupled with a court's inquiry that a defendant's decision to waive counsel and proceed on his own was made knowingly and intelli-

gently with full awareness of the risks and consequences. People v. Reason, 334 N.E.2d 572, 575 (N.Y. 1975).

B. THE NINTH CIRCUIT COMMITTED REVERSIBLE ERROR BY TOTALLY DISREGARDING THE STATE COURT FINDINGS, FAILING TO ACCORD THE STATE COURT FINDINGS THE PRESUMPTION OF CORRECTNESS, AND MISALLOCATING THE BURDEN OF PROOF TO THE STATE

Not satisfied at having applied a heightened standard which had not been urged upon it by MORAN, the Ninth Circuit panel then proceeded to give total factual credence and apparently conclusive weight to MORAN's mere assertions he had been under the influence of certain prescribed medications at the time of the plea. Moran at 265, 268. Regardless of the standard to be applied, the circuit court should not have ignored the respective findings of the state trial court and Nevada Supreme Court regarding MORAN's failure to provide evidentiary support for his claim that the medications impacted on

his competence to waive counsel and to enter a plea.

Regardless of which standard is to govern, nothing was presented to the Ninth Circuit which allowed it to ignore MORAN's failure to prove his case in the state collateral proceedings. Surely, the circuit court was cognizant of this Court's requirement and its own to defer to state court findings, even in competency cases. Maggio, at 2266; Evans v. Raines, 800 F.2d 884 (9th Cir. 1986), citing Miller v. Fenton, 474 U.S. 104 (1985). Clearly, the Due Process Clause does not prohibit allocating to the accused the burden of proof as to his competence. Medina, ___ U.S. at ___, 112 S.Ct. at 2577. It is hardly impermissible for the federal courts to allocate a similar or even heavier burden on a state petitioner seeking federal

habeas relief on the grounds of incompetency.[6]

Yet, the court excused MORAN from failing to meet his burden of proof in both the federal habeas corpus and state post-conviction proceedings to show by even a preponderance of the evidence that he was not competent to waive counsel or to plead guilty. Bouchillon at 592; Price v. Wainwright, 759 F.2d 1549, 1554 (11th Cir. 1985); Miller v. State, 517 P.2d 182, 184 (Nev. 1973). The mere fact that a defendant is being treated with anti-psychotic drugs does not per se render him incompetent to stand trial. The use of drugs is merely a relevant factor in the trial judge's determination of competency. In order to be entitled to a hearing, a defendant must present evidence demonstrating the dosages

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[6] One court has recently held that the standard of proof is high, so high that the facts must "positively unequivocably and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner." Sheley v. Singletary, 955 F.2d 1434 (11th Cir. 1992); Fallada v. Dugger, 819 F.2d 1564 (11th Cir. 1987).

given to him has affected him so adversely as to raise doubt concerning his ability to consult with his lawyer and have a rational understanding of the proceedings against him. Sheley, at 1439; Fallada, at 1569.

CONCLUSION

The Court should conclude that the Due Process Clause does not mandate courts to assess an accused's competency to plead guilty or waive counsel under a heightened standard qualitatively different from the standard of competency to stand trial. A unitary standard of competency modeled on the "understand and assist" formulation announced in Dusky has been applied for more than three decades and is consistent with due process requirements. The unitary standard eliminates the impractical evaluation of differing levels of competency at differing stages of a criminal justice proceeding. More importantly, a unitary standard strikes a balance between the interests of those defendants who choose to proceed to trial and those who prefer to resolve their cases in the plea negotiation process.

Finally, the application of one standard provides a modicum of fairness to the government, which routinely bears the economic burden of financing competency evaluations.

This Court should reverse the decision below and remand for further consideration, directing the circuit court to (1) apply a unitary standard of competency while deferring to state court findings of historical fact, and (2) decide the issues that the court did not address in its first opinion.

DATED: January 28, 1993.

Respectfully submitted.

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